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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

**ASGROW SEED COMPANY,**  
*Petitioner,*  
v.

**DENNY WINTERBOER and BECKY WINTERBOER,**  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

**BRIEF OF TED COOK AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

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**BRIEF OF TED COOK AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

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**INTEREST OF THE AMICUS CURIAE**

This brief is submitted on behalf of Ted Cook, an owner with members of his family, of Four Rivers Seed Company ("Four Rivers") of Cardwell, Montana. Four Rivers is in the business of operating a 400-acre potato farm on which it develops and sells seed potatoes to commercial growers who, in turn, sell potatoes to large supermarkets and retailers.

Four Rivers Seed Company currently grows seven varieties of the western russet potato, which it obtains initially from the state agriculture research and land grant uni-

versities programs at the University of Montana and University of Idaho. These programs develop sexually reproduced plant varieties in conjunction with the United States Department of Agriculture's Agriculture Research Service. In certain circumstances, through selective breeding of the varieties obtained, Four Rivers has itself developed refined seed potato varieties more suitable to the local growing environment, and more resistant to indigenous pests and diseases.

Four Rivers obtains the varieties it grows in the form of potato plant tissue segments (known as "seed potatoes" in farming circles) from the state research centers. The tissue segments are then grown under contract into very small plants which are next divided and grown in pods numbering from 25,000 to 45,000. Seed potatoes from the third generation of these plants, after weaker and diseased plants have been eliminated in each generation, are then sold to commercial potato growers. Cultivars from the second generation of the plants are also sold to other seed potato breeders.

The interest of Mr. Cook and Four Rivers in this proceeding results from the present consideration in Congress of legislation making seed potatoes subject to the Plant Variety Protection Act ("PVPA").

Mr. Cook and Four Rivers have a primary concern, if the legislation is enacted (as now seems likely), that the giant pharmaceutical and chemical companies that have recently entered aggressively into agribusiness will use the PVPA to monopolize the market in seed potatoes to the detriment of the small farmer and breeder. This is expected to be effected in two ways.

First, experience has demonstrated that the large agribusiness companies have been successful under PVPA in redirecting, sharply reducing, or even eliminating the research activities of the U.S. Department of Agriculture and the university research centers in connection with the

development of those sexually reproduced plant varieties now covered by PVPA. When the state university systems cease work on seed potatoes, Four Rivers will lose its primary source of new varieties thereof and will therefore be unable to conduct its established business in the same way it has done heretofore.

Second, experience under PVPA has further shown that notwithstanding their protestations, in this Court and elsewhere, to the effect that PVPA has stimulated commercial firms to conduct research into the genetics of sexually reproduced plant varieties, the giant agribusiness entrants have largely merely made minor alterations in known plant varieties previously developed by state research centers or by U.S.D.A. and then obtained PVPA certificates of exclusivity for each slightly altered variant.

Mr. Cook therefore anticipates that as a competing small breeder and grower, Four Rivers will either be denied access to seed potato variants protected by PVPA certificates or else it will be required to pay a significant premium, most likely in the form of a royalty, in order to obtain PVPA-protected seed potatoes that do not offer any corresponding improvement in potato product quality. In the same vein, acceptance by this Court of Petitioner's arguments in this case would—in the likely event that Congress subjects seed potatoes to PVPA—severely attenuate the rights of Four Rivers to sell seed potatoes to potato-producing farmers.

In sum, the grant of exclusive property rights in merely cosmetically refined, well-known varieties of sexually reproduced plants such as potatoes may well eliminate Mr. Cook's company, Four Rivers, and similarly situated potato breeders from pursuing their established businesses and deprive them of their livelihoods. Existing potato farmers are likely to be similarly adversely affected because if PVPA is construed as Petitioner urges, they will not be able to afford the high prices for seed potatoes that certificate owners will thereby be enabled to enforce.

The availability of exclusive rights over cosmetically new varieties of well-known agricultural crops gives mammoth agribusiness enterprises a potentially alarming stranglehold over an important segment of the nation's food supply, allowing them to become unreasonably enriched to the detriment of the plant breeder, the farmer and the public. The Court should not interpret the PVPA in this case so to strengthen such unwarranted monopoly property rights in derogation of the public interest.

#### SUMMARY OF ARGUMENT

The PVPA directs the award of 18-year certificates of exclusivity to the breeders of the sexually reproduced plants it covers, for every novel variety thereof. "Novel variety" is defined to encompass any identifiable difference, however slight, in any characteristic of the plant or its seed.

The PVPA constitutes an unconstitutional exercise of the limited patent power conferred upon Congress in Article I, Section 8, clause 8 of the Constitution because the "novel variety" as defined need not "promote Progress in Science and the useful Arts" as this imperative has been construed in the decisions of this Court.

In addition, the PVPA is not within the power of Congress to enact under the commerce clause. A specific limited power delegated in the Constitution cannot be circumvented or enlarged by reference to some other delegated power couched in ostensibly more general language.

#### ARGUMENT

Amicus presents this brief to bring to this Court's attention a focal issue that has not been raised by the parties—namely, whether the PVPA, authorizing the grant of exclusive private rights covering plant varieties that differ only minutely from known varieties of the same plant, is a constitutional exercise of the legislative power.

Amicus strongly urges the Court to address this issue directly. Recognizing, however, that the Court may feel constrained by the customs of (1) avoiding constitutional questions insofar as possible and (2) confining itself to questions presented by the parties, Amicus further urges the Court, at the least, to avail of the manifest constitutional frailty of the PVPA as demonstrated herein as a basis for limiting the application of that act within the narrowest possible bounds, in accordance with the decision below.

##### I. THE PVPA DOES NOT PROMOTE PROGRESS IN PLANT BREEDING BECAUSE IT REWARDS ATTAINMENT OF ONLY A SCINTILLA OF NOVELTY

The Plant Variety Protection Act ("PVPA"), 7 U.S.C. §§ 2321-2582 (1988) provides for the issuance of patent-like rights—i.e., exclusive privileges limited in time but otherwise essentially limitless within the terms thereof—to those who breed, develop or discover novel varieties of asexually reproduced plants.

The definition of "novel variety" which appears in the PVPA indicates clearly that only the merest scintilla of novelty over a known plant variety is required in order to qualify a cosmetically new variety for the grant of exclusivity. Thus, 7 U.S.C. § 2401(a) (1988) states:

"(a) The term 'novel variety' may be represented by, without limitation, seed, transplants, and plants, and is satisfied if there is:

(1) Distinctness in the sense that the variety clearly differs by one or more identifiable mor-

phological, physiological or other characteristics (which may include those evidenced by processing or product characteristics, for example, milling and baking characteristics in the case of wheat) as to which a difference in genealogy may contribute evidence, from all prior varieties of public knowledge at the date of determination within the provisions of section 2402 of this title; and

(2) Uniformity in the sense that any variations are describable, predictable and commercially acceptable; and

(3) Stability in the sense that the variety, when sexually reproduced or reconstituted, will remain unchanged with regard to its essential and distinctive characteristics with a reasonable degree of reliability commensurate with that of varieties of the same category in which the same breeding method is employed."

Of the stated criteria, only "distinctness" in any way relates to the necessary quantum of change over prior varieties of the same plant. Careful consideration of what the statute says that distinctness entails clearly reveals that while, e.g., an identifiable improvement in the quality or quantity of the ultimate agricultural product may render a new variety sufficiently "distinct", such a useful improvement over known varieties is *not at all* required. Instead, minute changes in the morphology or physiology of the plant, such as differences in leaf color, leaf shape, size or shape of the mature plant or of the harvested product, seed shape or size and the like—so small as to be recognizable only by professional plant scientists—will qualify the variety for the PVPA certificate imparting an exclusive 18-year privilege to the plant breeder.

Clearly, moreover, the minute change that gives rise to a "novel variety" as defined in the PVPA need have no relationship to any agriculturally, nutritionally or otherwise practically useful characteristic of the plant or

its product. Indeed, even a variety that produces a harvested product of lower nutritional value or one that is less well adapted to grow in certain soils than any known variety currently being cultivated will qualify under the language of the PVPA to receive the certificate of exclusivity, notwithstanding that it possesses no offsetting advantage or benefit.

## II. THE PATENT CLAUSE OF THE CONSTITUTION DOES NOT AUTHORIZE THE PVPA

The constitutional patent clause grants Congress power

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>1</sup>

In *Graham v. John Deere Co.*, 383 U.S. 1 (1966) this Court held that this power is expressly limited by the terms of the grant, saying

"The clause is both a grant of power and a limitation . . . The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existing knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored." 383 U.S. 5-6.

This Court reemphasized in *Anderson's-Black Rock v. Pavement Salvage Co.*, 396 U.S. 56, 61 (1969) and

<sup>1</sup> U.S. Constitution, Art. I, § 8, cl. 8.

*Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 279 (1976) that the Constitution requires a patent law to condition the grant of a valid patent right upon showing a quantum of progress in the useful arts transcending mere novelty.

Importantly, the holding is rooted in the Court's own precedent of more than one hundred years' standing. In *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U.S. 59, 73 (1885) and *Thompson v. Boisselier*, 114 U.S. 1 (1885) the Court opined that the Constitution requires a quantum of addition to useful knowledge that rises above mere novelty as the price for a valid patent. *Thompson* in particular indicates that

*"it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the statute, amount to an invention or discovery."* [Emphasis added] *Id.* at 11.

The same theme—that a patent-worthy invention or discovery must involve more than trivial, formalistic novelty, something not “within the mental reach of any one skilled in the [relevant] art”,<sup>2</sup> “something more than what is obvious to persons skilled in the art to which it relates”<sup>3</sup>—is the dominant theme of this Court's opinions relating to patentability criteria *at least* from the 1850 date of *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248 to the 1976 date of the most recently delivered pronouncement on this topic, *Sakraida v. Ag Pro, supra*, this page.

Even before 1850, in one of its earliest opinions touching upon the subject of patents, this Court explained that the patent laws are suffused with a primary public purpose, saying:

“While one great object [of the patent laws] was, by holding out a reasonable reward to inventors and giving them an exclusive right to their inventions for

a limited period, to stimulate the efforts of genius; the main object was ‘to promote the progress of science and the useful arts’ . . .” [Emphasis Added], *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 18 (1829).

Four years later, in *Shaw v. Cooper*, 32 U.S. (7 Pet.) 292 (1833) this Court explicated that this main object, this public purpose, is not served when patents are granted for only formalistically “new” discoveries, thereby withdrawing from the public a part of what it earlier possessed. The Court said:

“In the progress of society, the range of discoveries in the mechanic arts, in science, and in all things which promote the public convenience, as a matter of course, will be enlarged. This results from the aggregation of mind, and the diversity of talents and pursuits, which exist in every intelligent community. And it would be extremely impolitic to retard or embarrass this advance, by withdrawing from the public any useful invention or art and making it a subject of private monopoly.” 32 U.S. (7 Pet.) 320.

In short, the constitutional mandate that patent laws must “promote Progress in Science and useful Arts” not only defines a paramount public purpose<sup>4</sup> but requires that the reward of an exclusive right not be granted to the purveyors of mere trivial variations in old and well known items or techniques, thereby withdrawing those items and techniques, at least in part, from the public. Only recently, Justice O'Connor, speaking for a unanimous Court, so recognized in *Bonito Boats, Inc. v.*

<sup>2</sup> *Phillips v. Detroit*, 111 U.S. 604, 607 (1884).

<sup>3</sup> *Pearce v. Mulford*, 102 U.S. 112, 118 (1880).

<sup>4</sup> This Court has undeviatingly admonished in many contexts that the public purpose is dominant in the patent and copyright systems. See, e.g., *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972); *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971); *Lear, Inc. v. Adkins*, 395 U.S. 633 (1969); *Mercoind Corp. v. Mid-Continent Invest. Co.*, 320 U.S. 661 (1944); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); *Kendall v. Winsor*, 62 U.S. (21 How.) 322 (1858).

*Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). She stated:

"The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and the useful Arts.'" 489 U.S. 146.

The PVPA is an unfortunate and glaring example of legislation that fails to appreciate or respond to the balance reflected by the patent clause. On the face of its "novel variety" definition, *supra*, pp. 5-6, the PVPA encourages and fosters monopolies which stifle competition without any concomitant advance in the progress that the patent clause requires. *It assures that every trifling change* in any of the agricultural plants encompassed will afford its breeder a new exclusive privilege in the form of a certificate conveying an 18-year monopoly.

This Court eloquently summed up the consequences of such a scheme in *Atlantic Works v. Brady*, 107 U.S. 192 (1883) where it contrasted the design of the patent laws to what would clearly result from the automatic grant of a monopoly for every nuance of a new form of an already known product or technique, as follows:

"The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy

tax upon the industry of the country, without contributing anything to the real advancement of the art. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."<sup>5</sup> 107 U.S. 199-200.

Manifestly, PVPA authorizes obstructive, indiscriminate creation of exclusive privileges covering every shadow of a shade of change in an identifiable characteristic of any plant that it covers. The very issues the parties have posed here suggest that the consequences foreseen by this Court in *Atlantic Works* are now being visited upon this country's farmers in derogation of the requisites of the patent clause.

Notably, the PVPA itself tacitly acknowledges doubt existing in the Congress in 1970 when PVPA was first adopted, about whether the patent clause may have been violated. Specifically, 7 U.S.C. § 2581 (1988), which is identical to § 2581 of the original 1970 PVPA, bears the heading "Intent" and provides:

"It is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as to afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties. Constitutional clauses 3 and 8 of article I, section 8 are both relied upon."

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<sup>5</sup> Amicus perceives that the PVPA has already resulted in the indiscriminate creation of exclusive privileges over wheat, soybeans and cotton as detailed, e.g., in the Brief Amicus Curiae of the American Seed Trade Association, pp. 10-15. Indeed, the gravamen of that Association's position is that farmers continue to resist the heavy tax that the proliferation of monopoly certificates in the hands of agribusiness is attempting to lay upon them. Amicus fears that the extension of the PVPA to potatoes will subject it to the same uneasy burdens that Respondent here is struggling against.

In 1970 the PVPA was not routed through the sub-committee concerned with patents of the Judiciary Committee of either house of Congress, but was relegated to the Agriculture Committees of both houses.<sup>6</sup>

Clause 3 of Article I, section 8 of the Constitution, is, of course, the commerce clause.

### III. THE IMPERATIVES OF THE CONSTITUTIONAL PATENT CLAUSE CANNOT BE CIRCUMVENTED BY RESORT TO THE COMMERCE CLAUSE

Over the years, proponents of patents for trivially novel subject matter have repeatedly suggested that even if the patent clause of the Constitution does not permit legislation authorizing such patents, the commerce clause surely does so.<sup>7</sup>

The suggestion has manifest logical, legal and historical infirmities. First, of all, if the commerce clause gives the Congress the power to enact patent legislation, the patent clause is *a fortiori* mere surplusage. Secondly, if the commerce clause has an overriding effect upon the patent clause, there has been literally no point to this Court's own numerous carefully crafted interpretations of the patent clause and its overweening public purpose. Thirdly, it may be questioned why the patent clause exists at all.

Pre-constitutional history in England and on the European Continent shows that patents were often utilized there as tools of commerce rather than to foster progress

<sup>6</sup> See in this regard Flynn, *The Orphan Drug Act: An Unconstitutional Exercise of the Patent Power*, 1992 UTAH L. REV. 389, 430, n.119.

<sup>7</sup> See, e.g., *Picard v. United Aircraft Corp.*, 128 F.2d 632, 643 (2d Cir. 1942) (Frank, J., concurring); Posnack, *The Continued Erosion of our Patent System*, 52 J. PAT. OFF SOC'Y 225 (1970); Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 5 (1966); Lutz, *The Constitution v. the Supreme Court—Re Patents for Inventions*, 13 U. PITTS. L. REV. 449 (1952).

in science and useful arts. Thus, in England the earliest grants of patents were intended to encourage introduction into the realm of new trades and industries.<sup>8</sup> England continued to class new techniques and products that had not previously been introduced into the realm as patentable inventions and to denominate the importers as inventors until well after the American Revolution.<sup>9</sup> Considering the state of transportation and communication in the thirteenth to sixteenth centuries and the unlikelihood that imported trades were known in England before their introduction there, it is probable these newly introduced trades did promote some progress in science and useful arts within the realm, but it is nevertheless clear that the primary purpose of these introductions and of the patents that promoted them was to further commerce. Insofar as English practices are concerned, the propensities of various monarchs and even of Parliament to grant commercial monopolies, whether or not they be denominated as patents, is well known in American history. As noted in *Graham v. John Deere Co.*, *supra*, p. 7, it was an English monopoly on tea that sparked the American Revolution.<sup>10</sup>

While it is not clear how well versed the constitutional framers were about the European, including English, experiences with patents as such<sup>11</sup>, it is very clear that they

<sup>8</sup> For example, Prager, *A History of Intellectual Property from 1545 to 1787*, 26 J. PAT. OFF. SOC'Y 711 (1944) relates that in the thirteenth century Edward III granted a patent to Flemish immigrants to encourage them to introduce the technique for manufacturing worsted cloth from wool, then unknown in England, into use within his realm.

<sup>9</sup> Prager, *Standards of Patentable Inventions from 1474 to 1952*, 2 U. CHI. L. REV. 69 (1952); H. FOX, *MONOPOLIES AND PATENTS* (1947).

<sup>10</sup> 383 U.S. 1 at 7.

<sup>11</sup> Jefferson, for example, commented to Isaac McPherson in an 1813 letter that insofar as he knew England was the first country to have a general patent law. 6 WRITINGS OF THOMAS JEFFERSON

shared a distinct aversion to economic monopoly of an arbitrary nature. James Madison, for example, writing in 1792, said:

"That is not a just government, nor is property secure under it where arbitrary restrictions, exemptions and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word, but are the means of acquiring property strictly so called."<sup>12</sup>

A leading American treatise on patents written in the nineteenth century takes the view—which seems self-evident from their antipathy to monopoly generally, their experiences with English commercial monopoly and the very existence of the patent clause as a separate power from that of the commerce clause—that the framers of the Constitution rejected English patent antecedents when they adopted the patent clause. It states:

"When the Constitutional Convention met, its members had before them, there under consideration, the English idea, and a suggestion of a different idea, in the practice of the colonies. The English idea had been to encourage monopolies so that the introduction of a new trade or a new art was the essence of the law. The constitutional idea, however, was that of encouraging domestic invention, and in the first patent law of 1790, and in all subsequent amendments of that law, the basic idea has been to encourage original invention. The introduction of those

<sup>120</sup> (Washington Ed. 1814). In fact, however, the Venetian Republic had a general patent statute as early as 1474 which required that only new and ingenious devices could be patented. B. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 22-23 (1967). See also M. FRUMKIN, *THE EARLY HISTORY OF PATENTS FOR INVENTION* 27 (1947).

<sup>12</sup> THE COMPLETE MADISON 267-69 (S.K. Padover ed. 1953), quoting National Gazette, March 29, 1792.

inventions into use was wisely left to the incentive of business enterprise. The intention was to encourage inventive thought; to secure a disclosure of the inventive thought as promptly as possible."<sup>13</sup>

In short, a conclusion that Congress can enact patent legislation under the commerce clause flies in the face of history as well as logic.<sup>14</sup> In addition, such a conclusion is untenable on strictly legal grounds. It has been a basic rule of constitutional and statutory construction ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) that "*expressio unius est exclusio alterius*"—i.e., "expression of one thing is the exclusion of another".

*Marbury*, rejecting the premise that Congress could use its power to define the appellate jurisdiction of inferior courts as a pretext for amending the Constitution's express delegation of limited original jurisdiction to this Court, points out that:

"If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage—is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

<sup>13</sup> ROBINSON, *PATENTS* (Introduction 11.4-5) (1890).

<sup>14</sup> For a more detailed consideration of the constitutional standard of patentable invention, including its historical underpinnings, see Irons and Sears, *The Constitutional Standard of Invention—The Touchstone for Patent Reform*, 1973 UTAH L. REV. 653.

It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it." 5 U.S. (1 Cranch) 174.

The same rule of construction prompted this Court, in *Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457 (1982) to nullify a special bankruptcy statute not conforming to the "uniformity" mandate of Article I, section 8, clause 4 of the Constitution—and in so doing, to explain that:

"We do not understand either appellant or the United States to argue that Congress may enact bankruptcy laws pursuant to its power under the Commerce Clause. Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. Thus, if we were to hold that Congress had the power to enact non-uniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." [Citations omitted] 455 U.S. 468-69.

In short, where the Constitution makes an express, limited delegation of power to Congress, as the patent clause does, Congress may not ignore or circumvent the limitation by enacting a nonconforming statute under the cloak of a different delegated power, such as the commerce clause, even if that different power is ostensibly of broader scope.<sup>15</sup>

<sup>15</sup> For a more detailed legal discussion of why the patent power is not encompassed by the commerce power, see Flynn, *The Orphan Drug Act: An Unconstitutional Exercise of the Patent Power*, 1992 UTAH L. REV. 389, especially at 429-442.

#### CONCLUSION

The Court is requested to declare the PVPA null and void because beyond the power of Congress, as defined in the Constitution, to enact. Amicus submits that the invalidity of this Act is not only glaring, but so fundamental that it is an effective barrier to fashioning a rational construction of the specific provisions addressed in the briefs of the parties.

Should the Court nevertheless deem that custom and practice prevent it from addressing the PVPA's constitutionality in the circumstance that the parties have failed to raise the issue, Amicus requests the Court to take notice of the manifest infirmity of PVPA by construing the specific section already placed in issue by the parties, i.e., 7 U.S.C. § 2543, within the narrowest possible compass and, accordingly, affirming the decision below.

Respectfully submitted,

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